

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER 95-0689

Gross And Adjusted Gross Income Tax

For The Period Ending: 12/31/90 Through 12/31/93

NOTICE: Under IC 422-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Income Tax - Subpart F Income

Authority: IC 6-2.1-1-2; 45 IAC 1-1-9; 45 IAC 1-1-10

The taxpayer protests the Department's inclusion of Subpart F income in the computation of Indiana Gross Income Tax for the years 1991 and 1992.

II. Gross Income Tax - Foreign Dividends

Authority:

The taxpayer protests the Department's inclusion of foreign dividends in the computation of Indiana Gross Income Tax.

III. Tax Administration - Interest Calculation

Authority: None

The taxpayer requests that the 1992 overpayment of \$195,844 be applied to the 1992 tax year and then recompute interest due for the 1993 tax year after all protested items have been finalized.

IV. Tax Administration - Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-1 & 2

The taxpayer protests the Department's imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer was incorporated in Indiana on December 19, 1922 and operated primarily as a glass manufacturer in Indiana. During the past 73 years, the company has expanded into the manufacture of metal containers, plastic products, and even entered into the aerospace industry. As the taxpayer expanded into the manufacture of metal containers, plastic products, and the aerospace industry, these new operations were located in states other than Indiana. The metal container operations and aerospace business were headquartered in Colorado with no operating plants in Indiana. The plastic products operations were headquartered in South Carolina. Additional facts will be provided as necessary.

I. Gross Income Tax - Subpart F Income

DISCUSSION

The taxpayer protests the Department's inclusion of Subpart F income in the computation of Indiana Gross Income Tax for the years 1991 and 1992. Gross Income is defined as all gross receipts a taxpayer receives. IC 6-2.1-1-2. Receipts must be actual or constructively received by the taxpayer, credited to him, or paid to his creditors by another person. 45 IAC 1-1-9. Constructive receipt occurs when gross income is credited to the taxpayer, available for withdrawal, paid to another for the benefit of the taxpayer, or which represent income that the taxpayer is entitled. 45 IAC 1-1-10. "Any substantial limitation imposed upon the right to withdraw any amount, otherwise subject to withdrawal by a taxpayer, will defer the tax liability upon the same until the time that such limitation is removed or satisfied." 45 IAC 1-1-10. The taxpayer only reported the Subpart F income to comply with the Internal Revenue Code. As reported, the Subpart F income does not represent an actual or constructive receipt for gross income tax purposes.

FINDING

The taxpayer's protest is sustained.

II. Gross Income Tax - Foreign Dividends

DISCUSSION

The taxpayer protests the Department's inclusion of foreign dividends in the computation of Indiana Gross Income Tax. During the audit period, the company received dividends from three different foreign subsidiaries M International Ltd, B GmbH, and Plastics UK, LTD. M International Ltd. is a Hong Kong joint venture and holding company which has a subsidiary operating in the People's Republic of China as a metal container manufacturer. The taxpayer has a ten percent (10%) interest in the company. The taxpayer's headquarters for the metal container business is located in Colorado, and this location also manages the taxpayer's investment in the foreign subsidiary.

All of the officers of M International Ltd. are located outside of Indiana. B GmbH is directly related to the taxpayer's aerospace business with operations in Munich, Germany. The headquarters for the aerospace business is located in Colorado and this foreign investment was primarily managed from a business location in Irvine, California. All of the officers of B GmbH were located outside of Indiana. Plastics UK, LTD. is a manufacturer of plastic products with operations in Northern Ireland. Plastic's operations were related to the taxpayer's plastic operations headquartered in South Carolina. The taxpayer's investment in Plastics is managed from the South Carolina location. All officers of Plastics were located outside of Indiana. In support of its position the taxpayer cites 45 IAC 1-1-51. The taxpayer contends that it has a business situs outside of Indiana and the headquarter locations outside of Indiana provide centralized management for each of the business operations which is necessary for the success of each business and income derived from the foreign investments.

45 IAC 1-1-51 states:

The Department applies two tests in determining the taxability of income from intangibles... The first test is what may be termed the 'business situs' of the taxpayer... If the intangible or the income derived therefrom forms an integral part of a business regularly conducted at a situs in Indiana, the total gross income... will be required to be reported for taxation... Therefore, if a taxpayer has a 'business situs' in Indiana... and the intangible or the income derived therefrom is connected with that business, either actually or constructively, the gross receipts of those intangibles will be required to be reported for gross income tax purposes... the second test is what may be termed the 'commercial domicile' of the taxpayer.... If a taxpayer's commercial domicile is in Indiana, all of the income from intangibles will be taxed... except that income which may be directly related to an integral part of a business regularly conducted at a 'business situs' outside Indiana.

The taxpayer's commercial domicile is Indiana; however, the Department must determine whether the income from the foreign dividends is directly related to an integral part of a business regularly conducted at a business situs outside Indiana. It appears from the information provided by the taxpayer that the income from the foreign dividends is directly related to an integral part of the business regularly conducted in the other states. The Department reviewed returns and accompanying schedules for Colorado, California, and South Carolina which all showed the foreign dividends to be allocable to those states. Therefore, the foreign dividends received by the taxpayer are not subject to Indiana gross income tax.

FINDING

The taxpayer's protest is sustained.

III. Tax Administration - Interest Calculation

DISCUSSION

The taxpayer requests that the 1992 overpayment of \$195,844 be applied to the 1992 tax year and then recompute interest due for the 1993 tax year after all protested items have been finalized. The underpayment in question arose from an overpayment in 1992 which was applied to the 1993 tax year. The taxpayer contends that the Department should have credited the overpayment to the 1992 audited return.

A copy of the taxpayer's 1992 Indiana IT-20 Corporate Income Tax Return shows that the total overpayment calculated on line 67 of the return was to be applied to the next year's estimated tax account per line 69. Therefore, the Department applied the overpayment to 1993 as requested by the taxpayer on its 1992 IT-20.

FINDING

The taxpayer's protests is denied.

IV. Tax Administration - Penalty

DISCUSSION

The taxpayer protests the Department's imposition of the ten percent (10%) penalty assessment. Indiana Code section 6-8.1-10-2.1 requires a ten percent (10%) penalty to be imposed if the tax deficiency is due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2 provides guidance in determining if the taxpayer was negligent in nature.

Departmental regulation 45 IAC 15-11-1(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is also to be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish reasonable cause, the taxpayer must show that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

In this instance, the taxpayer has shown reasonable cause. The taxpayer has provided to the Department's satisfaction, sufficient justification for interpreting the code as it did.

FINDING

The taxpayer's protest is sustained. The taxpayer has provided to the Department's satisfaction, sufficient justification for interpreting the code as it did.